

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

10 BAODING TIANWEI GROUP CO., )  
11 LTD., a foreign entity, )  
12 Plaintiff, ) No. CV 07-862-HU  
13 v. ) OPINION AND  
14 PACIFICORP, an Oregon ) ORDER  
15 corporation, )  
16 Defendant. )  
17 PACIFICORP, an Oregon )  
18 corporation, )  
19 Third Party Plaintiff, )  
20 v. )  
21 WINBO INTERNATIONAL )  
22 CORPORATION, a California )  
23 corporation, and SUPER )  
24 POWER EQUIPMENT CO., a )  
25 California corporation, )  
26 Third Party Defendant. )  
27 SUPER POWER EQUIPMENT CO., )  
28 WINBO INTERNATIONAL )  
CORPORATION, )  
Counterclaimants, )  
v. )

1 BAODING TIANWEI GROUP CO., )  
2 Counter Defendant. )  
3 \_\_\_\_\_)

4 Renee R. Stineman  
5 John R. Barhoum  
6 Kjersten H. Turpen  
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27 HUBEL, Magistrate Judge:

28 The matters before the court are Pacificorp's motion for  
summary judgment (doc. # 49) and the motion by Super Power  
Equipment Company (Super Power) to stay and to compel arbitration  
(doc. # 44). Winbo International Corporation (Winbo International)  
joins in Super Power's motion (doc. # 84).

29 **Factual Background**

30 On August 16, 2001, Winbo International and Baoding Tianwei  
31 Group (Baoding or BTW) entered into an agency agreement under which  
32 Winbo International was to be the exclusive agent for Baoding in  
33

1 the United States for the supply and sale of electrical  
2 transformers manufactured by Baoding. Declaration of Thomas R.  
3 Johnson (Johnson Declaration), Exhibit 3; Declaration of Lucy Ni  
4 (L. Ni Declaration), ¶ 2. On or about the same day, Winbo  
5 International and Baoding entered into a Cooperation Agreement on  
6 Phase Modulation Transformer ("cooperation agreement") which  
7 provided that Winbo International would transfer certain technology  
8 to Baoding for the design and manufacture of phase transformers in  
9 exchange for an agency fee in connection with all sales of such  
10 transformers outside China. Johnson Declaration Exhibit 4; L. Ni  
11 Declaration ¶ 3.

12 On December 3, 2001, Pacificorp executed a Letter of Intent to  
13 purchase one transformer from Winbo International, for its Dave  
14 Johnston Plant. Johnson Declaration, Exhibit 6. The purchase of the  
15 transformer for the Dave Johnston plant was formalized in Purchase  
16 Contract No. 4500122784 (Johnston Contract). The Johnston Contract  
17 was executed by Pacificorp on November 12, 2002, and by Winbo  
18 International on behalf of itself and Baoding on November 27, 2002.  
19 Johnson Declaration, Exhibit 10, p. 9.

20 On March 29, 2002, Baoding and Winbo International entered  
21 into an agreement supplementing the cooperation agreement and the  
22 agency agreement (the supplementary agreement), under which it was  
23 agreed that if Baoding sold its products directly or indirectly in  
24 Winbo International's region without Winbo International's consent,  
25 Baoding would be deemed in breach of the contract and would pay a  
26 fine of 25% of the total amount of the contract. Johnson  
27

1 Declaration, Exhibit 5; L. Ni Declaration ¶ 3. The supplementary  
2 agreement states that it "shall be a part of the original  
3 Agreements and shall be of equal legal effect as the original  
4 Agreements." The supplementary agreement also provides:

5 In the event of changes in the Companies of both Parties  
6 (such as changes to the name or nature of the Company),  
7 the foregoing Agreements and this Supplementary Agreement  
7 shall automatically be binding upon the new Company  
without separate execution.

8 Johnson Declaration, Exhibit 5 ¶¶ 4, 5. The supplementary agreement  
9 provides that disputes unresolved through consultations are to be  
10 referred to the Chinese International Economic and Trade  
11 Arbitration Commission, and that the agreement is governed by  
12 Chinese law. Id. at ¶ 2.

13 On July 3, 2002, Baoding executed a Letter of Authorization,  
14 addressed to Pacificorp, confirming Winbo International as its  
15 exclusive agent. Johnson Declaration, Exhibit 2; Amabile  
16 Declaration, Exhibit A.

17 On July 6, 2002, Winbo International and Baoding executed an  
18 agreement relating to the Johnston contract, under which Baoding  
19 agreed that it would not communicate directly with Pacificorp on  
20 commercial issues, and that it would receive payment from Winbo  
21 International within 75 days of Winbo International's receipt of  
22 payment from Pacificorp. Johnson Declaration, Exhibit 7. Pacificorp  
23 received a copy of this agreement. Amabile Declaration ¶ 4.

24 On October 16, 2002, Pacificorp issued a purchase order for  
25 two phase angle transformers for its Monument substation from Winbo  
26 International. Johnson Declaration, Exhibit 8. The purchase of the  
27

1 transformers for the Monument substation was formalized in Purchase  
2 Contract No. 3000016931 (the Monument contract). The Monument  
3 contract was executed by Pacificorp on October 28, 2002, and by  
4 Winbo International on behalf of itself and Baoding on November 27,  
5 2002, the same day it executed the Johnston contract. Johnson  
6 Declaration, Exhibit 11, p. 10.

7 On December 12, 2002, Winbo International and Baoding executed  
8 an agreement relating to the Monument contract, under which Baoding  
9 agreed that it would not communicate directly with Pacificorp on  
10 commercial issues, and that it would receive payment from Winbo  
11 International within 15 days of Winbo International's receipt of  
12 payment from Pacificorp. Johnson Declaration, Exhibit 9. The record  
13 does not reveal whether Pacificorp received a copy of this  
14 agreement.

15 The Johnston contract and the Monument contract (collectively  
16 called the purchase contracts) designated both Winbo International  
17 and Baoding as "Seller." Johnson Declaration, Exhibits 10 and 11  
18 (purchase contracts). However, Winbo International conducted all  
19 negotiations for the sale of the transformers to Pacificorp.  
20 Baoding was not involved in the contract negotiations. L. Ni  
21 Declaration ¶¶ 4, 8, 10. Baoding acknowledges that all negotiations  
22 were conducted by Winbo International, on its behalf. Plaintiff's  
23 Response to Pacificorp's CSF ¶ 17.

24 The purchase contracts by their terms do not separate the  
25 rights and obligations of Baoding and Winbo International,  
26 including the right to receive payment from Pacificorp. Baoding  
27

1 issued invoices directly to Winbo International and received  
2 payments from Winbo International related to the purchase  
3 contracts. Johnson Declaration, Exhibit 15 (sample invoices from  
4 Baoding to Winbo International and payments from Winbo  
5 International to Baoding); Plaintiff's Response to Pacificorp's CSF  
6 ¶ 18.

7 All invoices provided to Pacificorp for the purchase contracts  
8 were issued by Winbo International. Baoding never invoiced  
9 Pacificorp for the purchase contracts. L. Ni Declaration, ¶ 12;  
10 Declaration of Karen Amabile ¶ 5; Johnson Declaration, Exhibit 13  
11 (invoices to Pacificorp); Johnson Declaration, Exhibit 14  
12 (plaintiff's response to defendant's first request for admissions  
13 No. 4 and 5). Through email correspondence, Baoding instructed  
14 Pacificorp to contact Winbo International directly about payments.  
15 Johnson Declaration, Exhibit 16 (June 13, 2003 email from Baoding  
16 to Pacificorp).

17 Pacificorp asserts, and Baoding does not deny, that it was  
18 understood by all parties to the purchase contracts that Pacificorp  
19 would remit payment to Winbo International and Winbo International  
20 would remit payment to Baoding. L. Ni Declaration ¶ 7; Johnson  
21 Declaration Exhibits 7 and 9 (July 2002 and December 2002  
22 contracts); Amabile Declaration, Exhibit B (July 2002 contract);  
23 Plaintiff's Response to Pacificorp's CSF ¶ 20.

24 The Johnston contract had a price increase, and later a price  
25 decrease, both of which were negotiated between Pacificorp and  
26 Winbo International. L. Ni Declaration ¶¶ 8, 9. According to the  
27

1 Supplemental Declaration of Lucy Ni, after delivery of the  
2 transformer purchased by Pacificorp under the Johnston contract,  
3 Pacificorp complained of errors and delays. Supplemental L. Ni  
4 Declaration ¶ 6. Lucy Ni states that "Winbo/Super Power acted as  
5 Baoding's agent in negotiating the resolution of Pacificorp's  
6 complaints," id., and kept Baoding informed of the status of the  
7 negotiations. Id. These negotiations ultimately resulted in an  
8 offset to the final contract price. Id.

9 The purchase contracts required the issuance of letters of  
10 credit by "Seller" to warrant the products. The letters of credit  
11 were negotiated and issued by Winbo International. Ni Declaration,  
12 ¶¶ 8, 10, 11; Johnson Declaration, Exhibit 12 (letters of credit);  
13 Plaintiff's Response to Pacificorp's CSF ¶ 20, 16.

14 In August 2003, Winbo International notified Pacificorp that  
15 it had changed its name to Super Power. On August 28, 2003,  
16 Pacificorp sent a letter to Diana Ni requesting written  
17 acknowledgment from her of the company's name change from Winbo  
18 International to Super Power for Pacificorp's records. Pacificorp  
19 also asked that, pursuant to Article 14, "Assignment," of the  
20 purchase contracts, its letter serve as an amendment to the  
21 purchase contracts reflecting the change in the name of the seller.  
22 Johnson Declaration, Exhibit 1. Baoding denies that the purchase  
23 contracts were amended to reflect the name change. Plaintiff's  
24 Response to Pacificorp's CSF ¶ 23.

25 Pacificorp remitted payments to Winbo International and,  
26 later, to Super Power under the purchase contracts. See Johnson  
27

1 Declaration, Exhibit 13 (some invoices requesting payment to Bank  
2 of America Standby Letter of Credit Department account of Winbo  
3 International and some requesting payment to the same account with  
4 Super Power shown as the beneficiary). The final payment was made  
5 on or about March 3, 2004. Amabile Declaration ¶ 6, Exhibit C  
6 (spreadsheet detailing payments made by Pacificorp, first to Winbo  
7 International and then to Super Power); L. Ni Declaration ¶ 3;  
8 Johnson Declaration, Exhibit 17 (bank statements and cancelled  
9 checks reflecting payments from Pacificorp to Winbo International  
10 and to Super Power). Pacificorp asserts that no monies are due and  
11 owing by Pacificorp under the purchase contracts, because it paid  
12 in full the amounts owed under the Monument contract and the  
13 reduced price as negotiated for the Johnson contract. L. Ni  
14 Declaration ¶ 13; Amabile Declaration ¶ 10. Baoding does not deny  
15 that Pacificorp paid in full the amounts negotiated under the  
16 Monument and Johnston contracts, but denies that Baoding received  
17 all the monies to which it was entitled under the purchase  
18 contracts because Pacificorp made some payments to Super Power,  
19 rather than Winbo International, citing Johnson Declaration,  
20 Exhibit 17 (showing some payments to Winbo International and some  
21 payments to Super Power). See Plaintiff's Response to Pacificorp's  
22 CSF ¶ 21.

23 On September 11, 2005, Baoding sent an email to Pacificorp  
24 notifying Pacificorp that it had revoked Winbo International's  
25 agency authorization. Johnson Declaration, Exhibit 18. The email  
26 states that as a result of the revocation,

27  
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1 Winbo is no longer qualified to bid, sign purchase  
 2 orders, receive payment, and/or perform under the  
 3 pertinent contracts in the name of [Baoding.] Therefore,  
 4 [Baoding] would certainly wish to settle any amounts  
 outstanding by Pacificorp to [Baoding] for the Purchase  
 Orders in the payment issues between Pacificorp and  
 [Baoding].

5 Id.

6 **Standard**

7 A party is entitled to summary judgment if the "pleadings,  
 8 depositions, answers to interrogatories, and admissions on file,  
 9 together with affidavits, if any, show there is no genuine issue as  
 10 to any material fact." Fed. R. Civ. P. 56 (c). Summary judgment is  
 11 not proper if material factual issues exist for trial. Warren v.  
 12 City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A genuine  
 13 dispute arises "if the evidence is such that a reasonable jury  
 14 could return a verdict for the nonmoving party." State of  
 15 California v. Campbell, 319 F.3d 1161, 1166 (9<sup>th</sup> Cir. 2003). Where  
 16 the record taken as a whole could not lead a rational trier of fact  
 17 to find for the non-moving party, there is no genuine issue for  
 18 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.  
 19 574, 587 (1986).

20 On a motion for summary judgment, the court must view the  
 21 evidence in the light most favorable to the non-movant and must  
 22 draw all reasonable inferences in the non-movant's favor. Clicks  
 23 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9<sup>th</sup> Cir.  
 24 2001). The court may not make credibility determinations or weigh  
 25 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55  
 26 (1990).

## Discussion

2 A. Pacificorp's Motion for Summary Judgment

3 Pacificorp's motion for summary judgment rests on an  
4 assumption, not undisputed, that Winbo International and Super  
5 Power are the same entity with different names. On the basis of  
6 this assumption, Pacificorp argues that its payment to Super Power  
7 constituted payment to Baoding, under the rule of agency that  
8 payment to an agent authorized to receive it is payment to the  
9 disclosed principal. See Alderman v. Davidson, 954 P.2d 779, 783  
10 (Or. 1998).

11 Pacificorp argues that the agreements and related documents  
12 show that Baoding granted Winbo International/Super Power express  
13 authority over the transactions involving the sale of the  
14 transformers, including the receipt of payment, through the agency  
15 agreement, the cooperation agreement, and the supplementary  
16 agreement. The course of conduct of Baoding was consistent  
17 throughout with the agreements: Baoding never directly negotiated  
18 or executed a contract with Pacificorp, Baoding expressly conferred  
19 authority on its agent to handle the collection of payments, and  
20 Baoding expressly agreed not to communicate with Pacificorp on  
21 commercial matters.

22 Pacificorp argues that accordingly, no issue of fact remains  
23 to be resolved, and Pacificorp is entitled to summary judgment that  
24 it has met its obligations to Baoding by making payment in full to  
25 Super Power.

26 | //

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1       As an alternative to the agency theory, Pacificorp argues that  
2 Winbo International/Super Power and Baoding are joint obligees  
3 under the purchase contracts, with identical pecuniary interests.  
4 The contracts do not create separate obligations between them, and  
5 in fact establish that the obligation owed by Pacificorp is payment  
6 to the "Seller," identified as Baoding and "Super Power."  
7 Pacificorp argues that Baoding and "Super Power" jointly held the  
8 right to payment, so that payment to one satisfied the obligation  
9 of payment to the other.<sup>1</sup>

10       Baoding responds that Pacificorp is not entitled to summary  
11 judgment because Super Power and Winbo International are separate  
12 entities, Baoding never had an agency agreement with Super Power,  
13 and Super Power is a stranger to the purchase contracts. In support  
14 of this argument, Baoding proffers online records from the  
15 Corporations Division for the California Secretary of State showing  
16 that Super Power and Winbo International have been assigned  
17 different corporate registration numbers. Declaration of John R.  
18 Barhoum ¶ 2, Exhibit 1. According to the Barhoum Declaration,  
19 Baoding made a request to the California Corporations Division for  
20 "all documents evidencing or relating to any name change by Super  
21 Power," and received nothing, but the record of a name change from  
22 Winbo USA Group to Super Power. Barhoum Declaration, ¶¶ 3, 4;  
23 Exhibit 3 (amendment to articles of incorporation for Winbo USA  
24

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25       <sup>1</sup>Although there were letters and emails between Pacificorp  
26 and Super Power indicating an intention to amend the purchase  
27 contracts to reflect that Winbo International was now named Super  
Power, the record does not contain executed amended contracts.

1 Group changing the name of the corporation to Super Power Equipment  
2 Co.).<sup>2</sup> The record before the court does not explain the  
3 relationship, if any, among Winbo USA Group, Winbo International,  
4 and Super Power, although I note that exhibits to the Supplemental  
5 Johnson Declaration indicate that both Lucy Ni and Diana Ni  
6 received emails at "winbo.us" Declarations from Lucy Ni state that  
7 she was employed by Winbo International and is now employed by  
8 Super Power. Consequently, an email address for Lucy Ni at  
9 "winbo.us" suggests, at the very least, that Winbo International,  
10 Winbo US and Super Power had some employees in common.

11 The Barhoum Declaration states further that "this office"  
12 (i.e., the law firm of Dunn Carney) has not seen any documents  
13 indicating that Super Power and Baoding were parties to any agency  
14 agreement or other contract, and that it "expect[s] the evidence  
15 will show that Baoding and Super Power had no relationship, agency  
16 or otherwise." Id. at ¶ 6. The Barhoum Declaration also states that  
17 "[w]e expect the evidence will show that Baoding never received  
18 notice of the purported name change." Id. at ¶ 7.

19 ///

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22 <sup>2</sup>Also attached to the Barhoum Declaration, as Exhibit 1, is  
23 a printout from the California Corporations Division showing  
24 Winbo International Corporation as a "suspended" corporation and  
25 Super Power Equipment Co. as an "active" corporation. Winbo  
26 International's corporate registration shows an address of 5700  
27 Stoneridge Mall Road #325, Pleasanton, California and Chao Wen Ni  
as its designated agent for service of process, at the same  
address. Super Power's corporate registration shows an address of  
5882 Turnberry Drive, Dublin California and Lucy Ni as its  
designated agent for service of process, at 7062 Briza Loop in  
San Ramon, California. Id.

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1       On the basis of the circumstantial evidence from the  
2 California Corporations Division and anticipated evidence--or lack  
3 of evidence--Baoding argues that 1) Pacificorp made at least some  
4 of its payments to the wrong entity, Super Power, a stranger to the  
5 contracts; 2) there is a genuine issue of material fact as to  
6 whether Pacificorp knew or should have known that Super Power would  
7 not tender Pacificorp's payments to Baoding; and 3) that in any  
8 event, Pacificorp "admits" that it did not make full payment under  
9 the purchase contracts, because the price reduction on the Johnston  
10 contract was negotiated with Super Power, which did not have  
11 authority from Baoding to reduce the price.

12       1. Has Baoding generated a genuine issue of material  
13 fact on whether Winbo International and Super Power  
are separate entities?

14       The issue is whether non-movant Baoding has met its burden on  
15 summary judgment of proffering evidence sufficient to create a  
16 genuine issue of material fact on its claim that Winbo  
17 International and Super Power are not the same entity. The evidence  
18 from the California Corporations Division is somewhat probative  
19 that they are not, and all reasonable inferences from this evidence  
20 must be drawn in Baoding's favor. The only other evidence Baoding  
21 has proffered is the Declaration of Xia Wei. This declaration is  
22 not sworn or made under penalty of perjury. It is signed, not by  
23 the declarant, but on behalf of Baoding. See Declaration of Xia  
24 Wei, p. 2. The declaration states that Xia Wei is the vice general  
25 manager of Baoding, and that Baoding "did not consent to, nor have  
26 any knowledge of, Pacificorp's alleged payments to" Super Power.

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1 Id. at ¶ 2. The declaration states further that Baoding and Super  
2 Power have "never been parties to an agency agreement or other  
3 contract," that Baoding "does not have a relationship with Super  
4 Power, contractual or otherwise," and that to Xia Wei's knowledge,  
5 "Baoding never received notice from Winbo that it purportedly  
6 changed its name to Super Power." Id. at ¶¶ 3, 4. Xia Wei's  
7 knowledge is not necessarily co-extensive with Baoding's knowledge  
8 and imputed knowledge. Xia Wei's declaration states that Winbo did  
9 not have authority from Baoding to accept less than full payment  
10 under the purchase contracts.

11 Pacificorp challenges the admissibility of Wei's declaration  
12 in its brief. See Pacificorp Reply Memorandum, p. 4, n. 5. I find  
13 it unnecessary to consider this challenge, because regardless of  
14 whether the Xia Wei declaration is admissible, the statements made  
15 do not create a genuine issue of material fact about whether Winbo  
16 International is or is not Super Power under another name.

17 2. Has Baoding generated a genuine issue of material  
18 fact as to whether Pacificorp knew or should have  
19 known that Super Power would not tender  
Pacificorp's payments to Baoding?

20 Baoding relies on Pacificorp's ability to access the  
21 California corporation records, had it wanted to, to support  
22 Baoding's argument that Pacificorp knew or should have known that  
23 Winbo International and Super Power were different entities. To  
24 support this argument, Baoding relies on two pieces of  
25 correspondence between Pacificorp and Super Power discussing the  
26 name change, neither of which indicates a copy to Baoding.

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1       One is an email dated July 22, 2003 from Lucy Ni to John  
2 Guerin of Pacificorp, copied to Diana Ni and discussing the name  
3 change. The email states that Winbo International is changing its  
4 name to Super Power. Barhoum Declaration, Exhibit 3. The second  
5 piece of evidence is a letter from Pacificorp to Super Power on  
6 August 28, 2003, acknowledging the name change, which similarly  
7 does not indicate that Baoding was copied.

8       I am unpersuaded by Baoding's argument that the absence of any  
9 indication that Baoding was copied on this correspondence  
10 necessarily creates an inference that 1) Baoding was unaware of the  
11 purported name change; and 2) Pacificorp knew Baoding was unaware.  
12 Such an inference is further weakened by the evidence discussed  
13 above that, subsequent to the events giving rise to this action,  
14 Baoding received payments from Super Power and entered into  
15 contracts with Super Power. Johnson Declaration, Exhibit 15 (Bank  
16 of America transfer of \$477,090 from Super Power to Baoding);  
17 Supplemental Johnson Declaration, Exhibit 1 (email dated September  
18 30, 2003 from Lucy Ni to "Kevin" at Baoding stating that she has  
19 read a draft contract between Baoding and Super Power, adding some  
20 changes, and attaching the contract signed by Super Power).

21       Super Power's briefing materials for its motion to compel  
22 arbitration contain another piece of evidence which creates the  
23 inference that Baoding knew Winbo International had become Super  
24 Power. Those materials contain a Declaration of Lucy Ni which  
25 states that Lucy Ni notified Baoding of the name change from Winbo  
26 to Super Power. Declaration of Lucy Ni in Further Support of Third  
27

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1 Party Defendant Super Power Equipment Co.'s Petition to Compel  
2 Arbitration ¶ 6 and Exhibit A (email in Chinese); Declaration of  
3 Pei Ling Haussecker, Exhibit C (English translation of Ni email in  
4 Chinese).

5 According to this declaration, as Assistant General Manager at  
6 Winbo International Corp., Lucy Ni was personally involved in the  
7 "designation of Super Power to carry on Winbo's ongoing transformer  
8 sales operations." Ni Declaration ¶ 3. She states that "Super Power  
9 is [a] closely held corporation wholly owned and operated by the  
10 owners, officers, and managers of Winbo, another closely held  
11 corporation, and conducts its transformer sales operations with the  
12 same employees as did Winbo." Id.

13 According to Ms. Ni, in mid-2003, the owners, officers and  
14 managers of Winbo International "decided to conduct their ongoing  
15 transformer sales operations under the Super Power name," id. at ¶  
16 5, and that on or about June 9, 2003, she sent via fax to Baoding  
17 "a written notice of Winbo's intention to perform its transformer  
18 sales operations pursuant the [sic] Winbo-Baoding Agreements under  
19 the Super Power name." Id. at ¶ 6. The Chinese copy of that notice  
20 is attached to her declaration as Exhibit A. She states that she  
21 "understand[s] that an English translation of this notice has been  
22 prepared and is being filed herewith." Id. The English translation  
23 of the notice is attached to the Declaration of Pei Ling  
24 Haussecker, submitted with the motion to compel arbitration. The  
25 translation is as follows:

26           ///  
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Dear Director Tang, how are you?

To better serve our customers and develop international market more broadly, our company's name will be changed to Super Power Equipment Company to deal with our existing customers and potential new customers and to provide our services according to the "Agency Agreement," "Cooperation Agreement," and "Supplementary Agreement."

## Winbo International Corporation

Haussecker Declaration, Exhibit B.

Ms. Ni states that after about June 2003, Super Power "assumed the duties and obligations of Winbo arising from and related to the Winbo-Baoding agreements," including 1) maintaining an office in the United States for Baoding; 2) promoting Baoding's transformer products; 3) assisting Baoding in collecting payments from transformer purchasers; and 4) remitting payments directly to Baoding. Ni Declaration at ¶ 8. Attached to the Ni Declaration as Exhibit C is the Funds Transfer Request that Super Power sent to Baoding in connection with a \$477,090 USD payment that Super Power made to Baoding. Id. at ¶ 8.<sup>3</sup> Ms. Ni states that except in connection with this litigation, to her knowledge, "Baoding never communicated to Winbo or Super Power any objection to Super Power's assumption of Winbo's duties, obligations, and performance under the Winbo-Baoding Agreements." Id. at ¶ 9.

Baoding's evidence is not sufficient to create a genuine issue of material fact from which a reasonable jury could find that Baoding was unaware Winbo International was doing business as Super Power, and that Pacificorp knew or should have known Baoding was

<sup>3</sup> This is the same document discussed above, Exhibit 15, p. 3 of the Johnson Declaration.

1 unaware and therefore should have made contract payments directly  
2 to Baoding rather than to Super Power.

3 I turn now to Baoding's argument that, even assuming Super  
4 Power is a successor entity to Winbo International, Pacificorp  
5 knew, or should have known, that Baoding could not collect payment  
6 against a mere successor entity because the general rule in Oregon  
7 is that when one corporation purchases all of the assets of another  
8 corporation, the purchasing corporation does not become liable for  
9 the debts and liabilities of the selling corporation, citing Tyree  
10 Oil, Inc. v. BOLI, 168 Or. App. 278, 282 (2000). I do not find this  
11 argument persuasive because there is no evidence in the record on  
12 whether there was an asset purchase, an assignment of rights, or  
13 simply a name change. The lack of evidence about what kind of  
14 transaction occurred casts doubt on the applicability of this case.  
15 Absent evidence of an asset purchase known to Pacificorp, the  
16 theory leads nowhere.

17 In any event, regardless of what kind of transaction occurred,  
18 there is no dispute that Winbo International had express authority  
19 from Baoding to act as its general agent, and express authority,  
20 through the supplementary agreement, to change its "name or nature"  
21 and be bound by the terms of the agreements between Winbo  
22 International and Baoding. There is no evidence that Baoding ever  
23 sent an invoice to Pacificorp or otherwise directed Pacificorp to  
24 send its payments to Baoding.

25 3. Has Baoding generated a genuine issue of fact on  
26 the issue of whether Pacificorp made full payment  
under the purchase contracts?

1 Baoding asserts that there is a genuine issue of fact as to  
2 whether Pacificorp discharged its entire obligation under the  
3 purchase contracts, because Pacificorp's payment to Super Power was  
4 only partial. Pacificorp counters that Baoding does not even  
5 explain, much less offer evidence proving, its claim that  
6 Pacificorp's payment was partial.

7 The evidence before the court shows that the initial price  
8 under the Johnston contract was \$1,235,000. L. Ni Declaration ¶ 8.  
9 The price was later increased through negotiations by Winbo  
10 International and Pacificorp to \$1,403,370, id., and then reduced  
11 to \$1,170,036 after negotiations with Pacificorp subsequent to  
12 delivery of the transformers, when Pacificorp complained of delays  
13 and errors. Id. at ¶¶ 8, 9; Johnson Supp. Declaration, Exhibit 2  
14 (purchase order printout from Pacificorp procurement department  
15 reflecting price increase as of January 17, 2003).

16 Winbo International had express authority from Baoding to  
17 communicate with Pacificorp on commercial matters, to negotiate the  
18 purchase contracts and to receive payments from Pacificorp. There  
19 is no evidence in the record that this express authority was  
20 revoked until September 11, 2005, after Pacificorp had made its  
21 last payment under the purchase contracts. Moreover, Pacificorp has  
22 proffered evidence that Baoding was aware of the price reduction on  
23 the Johnston purchase and had worked with Winbo International to  
24 address Pacificorp's complaints and reach a resolution. Ni  
25 Supplemental Declaration ¶ 6; Johnson Supplemental Declaration,  
26 Exhibits 3 (email from Winbo International to Baoding), 4 (email  
27

1 string between Baoding and Winbo International about Pacificorp's  
2 complaints), 5 (explanation from Baoding for errors complained of  
3 by Pacificorp), and 6 (email string involving Pacificorp and Winbo  
4 International dealing with price adjustments). All of this evidence  
5 establishes that Pacificorp reasonably believed that Winbo  
6 International/Super Power had authority to negotiate the price to  
7 be paid by Pacificorp, and that Pacificorp paid the price so  
8 negotiated.

9 Baoding has not generated a genuine issue of material fact  
10 with respect to its claim that Pacificorp's payments under the  
11 purchase contracts were incomplete.

12 I conclude that Baoding has not met its burden of showing the  
13 existence of a genuine issue of material fact, such that a  
14 reasonable jury could conclude that 1) Pacificorp knew or should  
15 have known that it should not make payments to Super Power; or 2)  
16 that Pacificorp failed to make all payments due under the purchase  
17 contracts. Pacificorp is entitled to summary judgment in its favor.

18 B. Super Power and Winbo International's Motion to Stay and to  
Compel Arbitration

19 Super Power and Winbo International move the court for an  
20 order compelling Baoding to arbitrate the disputes between them in  
21 accordance with the arbitration clause contained in the  
22 supplementary agreement, which provides:

23 Any dispute arising between the parties shall be resolved  
24 through consultations in the first instance. If no  
25 agreement is reached through consultations, such dispute  
shall be referred to the Chinese International Economic  
and Trade Arbitration Commission for arbitration. The  
26 Agreement shall be governed by Chinese laws.

1 Johnson Declaration, Exhibit 5.

2 The strong federal policy in favor of arbitration applies with  
3 equal force to international contracts. See, e.g., Schenk v.  
4 Alberto-Culver Co., 417 U.S. 506, 519-20 (1974). The policy is  
5 manifested by Congress's adoption of the Convention on Recognition  
6 and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208.

7 Baoding's opposition to the motion to compel arbitration is  
8 premised on its argument that Super Power is a stranger to the  
9 contracts because it is the successor to Winbo USA, not Winbo  
10 International, based on the records from the California  
11 Corporations Division. Baoding contends that it was unaware of the  
12 name change and the fact that Super Power was receiving money from  
13 Pacificorp under the purchase contracts.

14 The record does not support this argument, because it shows  
15 that Baoding was informed of the name change and received payments  
16 under the purchase contracts from Super Power. See Declaration of  
17 L. Ni in Further Support of Third Party Defendant's Petition to  
18 Compel Arbitration ¶¶ 6, 8, Exhibits A and C, Haussecker  
19 Declaration, Exhibit B.

20 Baoding asserts that Super Power has not provided any  
21 documentation or evidence proving that it is the same entity as  
22 Winbo International and therefore that Super Power is not a party  
23 to the agreements between Winbo International and Baoding.  
24 According to the Declaration of Renee Stineman, even counsel for  
25 Super Power and Winbo International have agreed that Winbo  
26 International and Super Power are not the same corporate entity,

27  
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1 and that there has been no assignment of the agreements. Stineman  
2 Declaration ¶ 4.

3 I find this argument unpersuasive for two reasons. First, the  
4 language of the supplementary agreement does not require that Winbo  
5 International remain the same corporate entity as Super Power or  
6 assign the contract to a separate corporate entity. The  
7 supplementary agreement expressly permits Winbo International to  
8 change its "name or nature," and still "automatically" bind the new  
9 company to the agency agreement, the cooperation agreement, and the  
10 supplementary agreement, "without separate execution." Johnson  
11 Declaration, Exhibit 5.

12 Second, Winbo International has joined in the motion to stay  
13 and to compel arbitration. There is no doubt that Winbo  
14 International is both a party to the arbitration agreement and a  
15 party to this lawsuit, and therefore has standing to petition for  
16 enforcement of the arbitration provision.

17 Super Power makes a number of arguments that under general  
18 contract and agency principles, a nonsignatory may enforce an  
19 arbitration agreement against a signatory under different theories,  
20 including 1) equitable estoppel; 2) a sufficiently close  
21 relationship between the signatory and nonsignatory; 3) the  
22 existence of an agency relationship between the signatory and the  
23 nonsignatory. See, e.g., Comer v. Micro, Inc., 436 F.3d 1098 (9<sup>th</sup>  
24 Cir. 2006) (equitable estoppel); C.D. Partners LLC v. Grizzle, 424  
25 F.3d 795 (8<sup>th</sup> Cir. 2005) (close relationship between signatory and  
26 non-signatory and agency relationship). The record does not raise  
27

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1 a material issue of fact on the question of whether Superpower is  
2 the same entity as Winbo International, nor does the supplementary  
3 agreement require Winbo International to refrain from changing its  
4 "name or nature." The language of the supplementary agreement makes  
5 it unnecessary to reach this argument.

6 As an alternative to its argument that Super Power is not a  
7 party to the arbitration agreement, Baoding asserts that if the  
8 court should find the claims asserted by Baoding against Super  
9 Power are subject to arbitration, the court should not order  
10 arbitration in China, citing Bauhinia Corp. v. China Natal Mach. &  
11 Equip. Imp. & Exp. Corp., 819 F.2d 247, 250 (9<sup>th</sup> Cir. 1987) ("In  
12 absence of a term specifying location, a district court can only  
13 order arbitration within its district.") Baoding points out that  
14 the arbitration clause at issue states that the dispute is to be  
15 referred to an arbitration service, the Chinese International  
16 Economic and Trade Arbitration Commission (CIETAC), but nowhere  
17 identifies a forum for arbitration.

18 In response to this argument, Super Power asserts that an  
19 arbitration clause specifying a particular organization to  
20 administer the arbitration is treated as an exclusive forum  
21 selection clause, and the arbitration must be held before that  
22 administrator. Super Power cites In re Salomon, Inc., 68 F.3d 554,  
23 557-58 (2d Cir. 1995).

24 In Salomon, the Second Circuit joined two of its sister  
25 circuits in holding that designation of a particular arbitrator can  
26 also constitute a forum selection clause. See also Luckie v. Smith

1 Barney, Harris Upham & Co., 999 F.2d 509 (11<sup>th</sup> Cir. 1993) (per  
2 curiam); Roney & Co. v. Goren, 875 F.2d 1218 (6<sup>th</sup> Cir. 1989) (all  
3 involving arbitration of securities cases before self-regulatory  
4 associations such as the New York Stock Exchange pursuant to the  
5 AAA). Super Power argues that the court need only compel  
6 arbitration and refer the current disputes to CIETAC, arguing that  
7 as a practical matter, such an order could be the equivalent of  
8 ordering arbitration in China. Super Power has attached CIETAC's  
9 arbitration rules, which provide that arbitrations are to be  
10 conducted in either Beijing or Shanghai, and asks that the court  
11 take judicial notice of the rules under Rule 201 of the Federal  
12 Rules of Evidence.

13 Super Power cites to the Convention on Recognition and  
14 Enforcement of Foreign Arbitral Awards, under which courts are  
15 authorized to compel arbitration in China and elsewhere. 9 U.S.C.  
16 § 206 ("A court having jurisdiction under this chapter [9 U.S.C. §§  
17 201-208] may direct that arbitration be held in accordance with the  
18 agreement at any place therein provided for, whether that place is  
19 within or without the United States,"); see also Jain v. Deere, 51  
20 F.3d 686, 690 (7<sup>th</sup> Cir. 1995).

21 Super Power also distinguishes Bauhinia, the case relied on by  
22 Baoding, because the arbitration clause in Bauhinia specified no  
23 location for arbitration and specified no rules under which the  
24 arbitration was to proceed. 819 F.2d at 248. In contrast, Super  
25 Power argues, the arbitration clause in this case provides for  
26 arbitration before CIETAC, which does specify the rules under which  
27

1 the arbitration is to proceed.

2 I conclude that it is unnecessary for me to take judicial  
3 notice of CIETAC's rules and order arbitration in China. Although  
4 the Salomon case involved arbitration under the FAA, I am persuaded  
5 by the Salomon court's analysis to the extent of concluding that an  
6 agreement to arbitrate before a particular arbitrator avoids the  
7 ambiguity as to forum and rules found in the Bauhinia case, and can  
8 also constitute a forum selection clause. Accordingly, the motion  
9 by Super Power and Winbo International to stay and to compel  
10 arbitration before CIETAC, pursuant to the terms of the arbitration  
11 provision of the supplementary agreement, is granted.

12 **Conclusion**

13 Pacificorp's motion for summary judgment (doc. # 49) is  
14 GRANTED. The motion by Super Power to stay and to compel  
15 arbitration (doc. # 44), joined by Winbo International (doc. # 84)  
16 is GRANTED.

17 IT IS SO ORDERED.

18  
19 Dated this 10<sup>th</sup> day of September, 2008.

20  
21 /s/ Dennis James Hubel

22 Dennis James Hubel  
23 United States Magistrate Judge  
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